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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

DARYLL RICHARDSON and JOHN WALKER,
Petitioners,
v.
RONNIE LEE MCKNIGHT,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF THE INTERNATIONAL CITY/COUNTY MANAGEMENT ASSOCIATION, COUNCIL OF STATE GOVERNMENTS, NATIONAL ASSOCIATION OF COUNTIES, INTERNATIONAL MUNICIPAL LAWYERS ASSOCIATION, U.S. CONFERENCE OF MAYORS, AND NATIONAL LEAGUE OF CITIES AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether corrections officers who are employed at a prison which is operated by a non-governmental corporation pursuant to a contract with a state or local government are entitled to qualified immunity in a suit under 42 U.S.C. § 1983.

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INTEREST OF THE *AMICI CURIAE*

Amici are organizations whose members include state, county and municipal governments and their officials throughout the United States; *amici* and their members have a compelling interest in legal issues that affect state and local governments. The issue in

this case, whether guards employed at a prison operated by a non-governmental corporation under a contract with a State are entitled to qualified immunity under 42 U.S.C. § 1983, is of core concern to *amici* for several reasons.

In this era of fiscal restraint and government downsizing, state and local governments must continue to provide essential services such as incarcerating dangerous criminals. This is no small task—between 1980 and 1994, the number of inmates in state prisons increased threefold to more than 900,000. *See* U.S. Department of Justice, Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1995* 548 (1996) (Table 6.11). The population in county and municipal jails has also grown dramatically. *Id.* Many state and local governments have thus turned to the private sector both to operate prisons and to provide ancillary services such as medical care.

The court of appeals' holding that guards employed by contract prison operators are not entitled to qualified immunity—even though public sector guards doing identical work are—poses a substantial threat to the public interest. In the course of their duties, all prison guards encounter a variety of incidents many of which involve threats to the safety of other inmates, prison staff, and the public, and require a prompt and decisive response. The court of appeals' holding, however, subjects guards to damages liability even when the precise contours of constitutional rights have not been clearly established. Such a legal regime will only prompt guards to engage in self-protective behavior by, for example, failing to take decisive action when it is needed. It will also make it more difficult for governments to obtain the assistance of

other professionals such as physicians, whether on a contract or a cooperative basis. *See* discussion *infra* at 17 & n.6.

Because of the importance of these concerns to *amici* and their members, this brief is submitted to assist the Court in its resolution of this case.[1]

STATEMENT

In recent years, state and local governments have been faced with huge increases in inmate populations. Between 1980 and 1994, the population of state prisons increased threefold to more than 900,000; the number of prisoners in local jails increased by 165 percent to more than 480,000. *See* Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics —1995* at 548 (Table 6.11). Most state corrections agencies anticipate continued increases in their prison populations in the future. *Id.* at 553 (Table 6.20).

These trends carry a substantial price tag. According to 1994 data, the federal and state governments spend on average $53.24 per inmate per day. *See* Criminal Justice Institute, *The Corrections Yearbook 1995* 51 (1995). Moreover, in fiscal year 1995, state corrections agencies spent nearly $22 billion, or approximately 4.8 percent of state budgets, *see id.* at 48-49; most States projected further increases in spending in fiscal year 1996. *Id.* at 49-50. While many States have responded to the increase in their prison populations by adding capacity either through expansion or construction of new facilities, *see id.* at 38-41, numerous States have looked to alternative

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[1] The parties have consented to the filing of this brief *amicus curiae*. Letters indicating their consent have been filed with the Clerk of the Court.

mechanisms to accommodate this ever growing strain on their budgets.

An increasing number of state and local governments are thus contracting out for the operation of prisons and the provision of prison services such as medical care and substance abuse treatment. Twenty-eight States have enacted legislation authorizing their corrections agencies to contract with private prison operators, *see Do Private Prisons Save Money?*, State Legislatures, Dec. 1996, at 7, and at least nineteen States and numerous local jurisdictions have entered into contracts with private prison operators for the incarceration of prisoners. *See* Charles W. Thomas & Dianne Bolinger, *Private Adult Correctional Facility Census* 2-21 (9th ed. 1996).[2] As of December 31, 1995, there were 104 privatized prisons under contract, with a rated capacity in excess of forty three thousand inmates; contractors anticipated adding more than twenty thousand beds within twelve to eighteen months. *Id.* at 1. Moreover, it was estimated that by year end 1996, the design capacity of prisons under contract would grow to at least 84,500 beds, an additional 33 percent. *Id.* at ix. It is thus clear that privatized prisons are an important alternative for corrections administrators in responding to prison overcrowding.

What is more, contract prison operators have shown that they can provide corrections services of high standard. A recent review by Dr. Charles W. Thomas, Director of the University of Florida's Private Corrections Project, determined that no privately operated jail or prison "is operating under a consent decree or court order as a consequence of suits brought against it by prisoner plaintiffs" for constitutional violations. *Matters Relating To The Federal Bureau Of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 108 (1995). In addition, many privately operated prisons, including the one operated by petitioners' employer, have been accredited by the American Correctional Association and others are in the process of obtaining accreditation. *See id.; see also Private Adult Correctional Facility Census* at 2-21. The willingness of contract prison operators to seek accreditation—a process which involves a lengthy audit of a prison's operations and services by experienced corrections professionals—is a strong indicator that such firms take seriously their obligation to provide high caliber and constitutionally adequate corrections services.

[2] The U.S. Marshals Service, Immigration and Naturalization Service, and Federal Bureau of Prisons have also contracted with private operators for the incarceration of prisoners. *See Private Adult Correctional Facility Census* at 2-11, 14, 16, 18, 21.

SUMMARY OF ARGUMENT

1. The public interest requires that prison guards at contract operated prisons receive the same qualified immunity in Section 1983 suits which the Court has long extended to their counterparts at publicly operated institutions. Guards at contract prisons perform the same functions as those at public prisons; they must maintain order and security in the institution and must respond to a variety of incidents which implicate the safety of other inmates, prison staff, and the public. A proper response to these incidents requires prompt and effective action which frequently must be undertaken with inadequate information. Denying qualified immunity to guards at contractor oper-

ated prisons will only prompt them to engage in self-protective behavior including timid decisionmaking, which could well result in a loss of control of the institution, prisoner escapes, and death or serious bodily injury to other inmates, prison staff and the public at large.

It could also interfere with the State's attainment of its penological goals. As part of their duties, guards are expected to enforce the institution's regulations. Denying guards qualified immunity creates, in effect, a regime of strict liability under which guards will be subject to damages liability for violating constitutional rights even when the law is not clearly established. The fear of personal liability for enforcing prison regulations later held to be unconstitutional could well prompt guards to look the other way rather than enforce them. Not only could this lead to a breach of security or order, it could also interfere with the State's retributive goals as guards ignore rules pertaining to the possession of contraband items or regulating inmate behavior.

2. In denying petitioners qualified immunity, the court of appeals theorized that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise," Pet. App. 16a n.4, and that the guards employed by contract prison operators pose an increased threat (over that posed by their public sector counterparts) to inmates' constitutional rights because they "act . . . out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* at 15a. This reasoning, however, rests on highly problematic assumptions about the behavior of both the guards and their employers.

Tellingly, the court of appeals cited no empirical evidence for its assertion that corporations operating prisons are more likely to violate constitutional rights than their public sector counterparts. Moreover, this assertion simply ignores the various political, legal and market based incentives influencing the firms' behavior. It ignores that the State, through both its executive and legislative branches, engages in oversight of the corporation and has the right to cancel the contract at any time upon the giving of adequate notice. *See* Tenn. Code Ann. §§ 41-24-104(a)(1)-(2) & (c)(3); 41-24-109. It ignores the availability of judicial oversight under Section 1983 and that a corporation which cuts constitutional corners risks an adjudication to that effect which might prompt the State to terminate its contract. Finally, it ignores the presence of competition from other firms which have demonstrated their ability to operate prisons in a cost-effective manner without violating constitutional norms.

Considering the nature of the constitutional injuries which guards are most likely to inflict in interacting with prisoners—e.g., violating the Eighth Amendment's prohibition of cruel and unusual punishment by using excessive force—it is improbable that economic considerations are a factor in guards' decisionmaking. Indeed, if the profit motive influences guards' decisionmaking, it would actually induce them to commit fewer constitutional violations. Guards would use less force than that which gives rise to a constitutional violation because the use of force might well inflict a physical injury requiring

medical treatment. The provision of such treatment would raise the corporation's costs and decrease its profitability. Moreover, if guards violate prisoners' constitutional rights, their behavior could result in their employer losing its contract and unemployment for themselves. If guards at contract prisons act "out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, they are, contrary to the court of appeals' theory, likely to pose a diminished threat of constitutional injury.

ARGUMENT

PRIVATE INDIVIDUALS PERFORMING GOVERNMENTAL FUNCTIONS AT THE BEHEST OF THE STATE ARE ENTITLED TO QUALIFIED IMMUNITY IN SUITS BROUGHT UNDER SECTION 1983

In *Procunier v. Navarette*, 434 U.S. 555, 561-62 (1978), the Court held that state prison officials serving in both supervisory and subordinate capacities are entitled to qualified immunity in a suit brought under 42 U.S.C. § 1983. The Court's analysis recognized that prison officials, like other executive branch officials, must exercise substantial discretion in the pursuit of their duties. *See id.* Indeed, few other governmental functions can make a greater claim for the need of officials to "'exercise their discretion with[out] undue timidity'" than the administration and operation of corrections facilities. *Id.* at 562 (quoting *Wood v. Strickland*, 420 U.S. 308, 321 (1975)). As the Court has long noted, "[p]rison administrators are responsible for maintaining internal order and discipline, [and] for securing their institutions against unauthorized access or escape." *Procunier v. Martinez*, 416 U.S. 396, 404 (1974).

The Court's observations are no less true when a corrections facility is operated by a private contractor. Such a facility performs the same governmental functions as a state operated penitentiary—it punishes and incapacitates criminal offenders who have been adjudged guilty of a crime. The scenarios which prison officials and corrections officers must respond to—fights, rapes, riots, escape attempts, hostage takings, and violations of prison rules—are unfortunately commonplace in prisons regardless of who operates them.

The court of appeals acknowledged that under this Court's holding in *Procunier v. Navarette*, "*state employed* correctional officers do enjoy the protections of qualified immunity in carrying out their duties." Pet. App. 4a. It also acknowledged that "[t]he public undoubtedly has an interest in maintaining secure and efficient correctional facilities," and that "correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest." *Id.* at 15a. It nonetheless theorized that because petitioners are "employees of a private corporation seeking to maximize profits, [they] act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security." *Id.* Reasoning that the incentive of greater employer profits would prompt "cutting corners on constitutional guarantees," and thus lead to an "increased threat of injury by violation of constitutional guarantees," the court of appeals held that petitioners are not entitled to qualified immunity. *Id.* at 16a.

As explained below, the court of appeals' theory is fatally flawed in several respects. First, it is oblivious to its consequences for the maintenance of security in privately operated prisons as well as the State's

ability to attain its penological goals. It also has adverse consequences for the government's ability to recruit persons to perform governmental duties. Second, it ignores that it is prison guards and not the corporation who have been sued here. Whether it is true as a theoretical matter that a for-profit corporation has an incentive to violate constitutional rights to maximize profits, it is a dubious assertion to suggest that such concerns enter into the decision-making process of guards in their numerous interactions with prisoners, or that private sector guards are subject to different pressures than public sector ones. Moreover, the court of appeals simply ignores the existence of other legal and political mechanisms to ensure that contract prison operators do not violate prisoners' constitutional rights. Denying prison guards qualified immunity does not address this concern. The judgment of the court of appeals should therefore be reversed.

I. THE COURT'S SECTION 1983 JURISPRUDENCE SUPPORTS GRANTING QUALIFIED IMMUNITY TO EMPLOYEES OF CONTRACTORS WHO PERFORM GOVERNMENTAL FUNCTIONS

A. The Public Interest Requires That Corrections Officers At Contract Prisons Be Granted Qualified Immunity

This Court has long recognized that "the public interest requires decisions and actions to enforce laws for the protection of the public." *Scheuer v. Rhodes*, 416 U.S. 232, 241 (1974). As the *Scheuer* Court further observed, "[p]ublic officials, whether governors, mayors or police . . . who fail to make decisions when they are needed or who do not act to implement decisions when they are made do not fully and faithfully perform the duties of their offices." *Id.* at 241-42.

The Court has thus endorsed the doctrine of official immunity, which is rooted in "two mutually dependent rationales." *Id.* at 240. The first is "the injustice, particularly in the absence of bad faith, of subjecting to liability an officer who is required, by the legal obligations of his position, to exercise discretion." *Id.* The second is "the danger that the threat of such liability would deter his willingness to execute his office with the decisiveness and the judgment required by the public good." *Id.*

The Court has also recognized that "[i]n situations of abuse of office, an action for damages may offer the only realistic avenue for vindication of constitutional guarantees." *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (*citing Butz v. Economou*, 438 U.S. 478, 505-06 (1978)). The doctrine of qualified immunity balances the need to protect citizens against officials' abuse of their offices and the interests which the official immunity doctrine seeks to vindicate. *See Wyatt v. Cole*, 504 U.S. 158, 167-68 (1992); *Butz*, 438 U.S. at 506-07.

In striking this balance, the Court has, however, been mindful of the costs to the public interest imposed by damages suits against public officials. As the Court observed in *Harlow*, such suits impose "a cost not only [on] the defendant officials, but [on] society as a whole." 457 U.S. at 814. And while most of the Court's qualified immunity cases have involved high ranking officials, *see id.*; *Butz*; *Scheuer*, there can be no dispute that suits against lower level officials and employees can impose great costs on society. *See, e.g.*, Peter H. Schuck, *Suing Our Servants: The Court, Congress, and the Liability of Public Officials for Damages*, 1980 S.Ct. Rev. 281, 309-15 (1980). In the case of lower level officials, the per-

ceived risk of personal liability may prompt them to engage in self-protective behavior such as "refrain-[ing] from acting," or "delay[ing] action," which may result in substantial harm to the public interest. *Id.* at 309-10.

In *Navarette*, the Court recognized as much in extending the protection of qualified immunity to corrections officers of publicly operated prisons. *See* 434 U.S. at 562. Indeed, there are two clear and compelling reasons which support qualified immunity for corrections officers: (1) the need to maintain institutional security and order and (2) the need to not unduly interfere with the States' attainment of their penological goals.

As the Court has observed, prisons are "volatile" environments which are involuntarily populated by those

> who have a demonstrated proclivity for antisocial criminal, and often violent, conduct. Inmates have necessarily shown a lapse in ability to control and conform their behavior to the legitimate standards of society by the normal impulses of self-restraint; they have shown an inability to regulate their conduct in a way that reflects either a respect for law or an appreciation of the rights of others.

Hudson v. Palmer, 468 U.S. 517, 526 (1984).

In the course of their duties, corrections officers must respond to a variety of incidents including assaults, rapes, riots, escape attempts, hostage takings, and violations of prison rules.[3] A proper response to

[3] Recent statistics demonstrate the difficulty of maintaining security and order in prisons. In 1994, correctional institutions housing adults reported that 258 inmates escaped from high and medium security facilities; 1619 escaped from low and minimum security facilities. Criminal Justice Institute, *The Corrections Yearbook 1995: Adult Corrections* 23-24 (1995). Inmates, as reported by 44 agencies, committed 13,379 assaults against corrections staff and, as reported by 45 agencies, 24,128 assaults against fellow inmates. *Id.* at 25-26. Of these, more than 2000 assaults on staff resulted in injuries requiring medical attention; over 7400 inmate on inmate assaults required medical attention. *Id.* at 26. Moreover, in 1994 state and federal corrections agencies filed nearly 1.7 million misconduct reports against inmates; nearly six hundred thousand of these reports involved incidents categorized as major misconduct. *Id.* at 28.

In addition, there were 61 inmate on inmate homicides in 1994 and 63 such homicides in 1995. Bureau of Justice Statistics, *Sourcebook of Criminal Justice Statistics—1995* at 603.

such incidents frequently requires prompt and effective action, which must often be undertaken with inadequate information. As the Court has noted, corrections officers must routinely act " 'in haste, under pressure, and frequently without the luxury of a second chance.' " *Hudson v. McMillian*, 503 U.S. 1, 6 (1992) (quoting *Whitley v. Albers*, 475 U.S. 312, 320 (1986)). Timid decisionmaking by corrections officers could well result in a loss of control of the institution, prisoner escapes, and death or serious bodily injury to other inmates, prison staff and the public at large.

The Court's holding in *Navarette* that state employed corrections officers are entitled to qualified immunity thus serves the compelling public interests of preserving institutional security and order. These interests are in no way diminished because the State has contracted with a non-governmental for-profit corporation to operate its prisons. Incidents such as riots, escape attempts, and hostage takings pose the

same substantial threat of loss of life and bodily injury whether they occur in a state operated or a contractor operated prison.

Beyond these ad hoc situations, corrections officers are called upon to enforce the institutions' myriad regulations. Such regulations are generally diverse in their scope, addressing matters which include, *inter alia*, the items which inmates are prohibited from possessing, inmate correspondence, visitation, contact with the news media, telephone calls, use of prison libraries, recreational privileges, and searches. *Cf. generally* 28 C.F.R. pts. 540-553 (Federal Bureau of Prisons Institutional Management regulations). They serve various purposes, including the preservation of institutional security and order and the imposition of punishment.

The fear of personal liability for enforcing regulations later held to be unconstitutional could well prompt corrections officers to look the other way rather than enforce them. In some instances, the failure to enforce a regulation could lead to a breach of security or a loss of order. In others, the failure to enforce regulations could result in an interference with the States' retributive goals as guards ignore the institution's rules pertaining to the possession of contraband items[4] and other aspects of inmate

[4] Within a prison, the definition of contraband is generally much broader than it is in civil society. For example, the Federal Bureau of Prisons defines contraband as "material prohibited by law, or by regulation, or material which can reasonably be expected to cause physical injury or adversely affect the security, safety, or good order of the institution." 28 C.F.R. § 500.1(h). While courts ordinarily defer to prison administrators, a guard's confiscation of some items might well be challenged on various federal constitutional grounds.

behavior. Indeed, it could well lead to a two tier system within the State's penitentiaries: one, comprising prisons run by the State in which the guards still enforce the rules, and a second one, where essential rules are not enforced because the guards do not have qualified immunity.

In either type of prison, it is essential that corrections officers be able to carry out their duties without undue apprehension of personal liability. Subjecting corrections officers at contractor operated prisons to personal liability even when constitutional rights have not been clearly established will only induce these officers to engage in self-protective behavior with substantial harm to the public interest. Private sector prison guards, after all, can no more be expected to predict the future course of federal constitutional law than public sector guards. *See Navarette*, 434 U.S. at 562. It is especially unjust to impose on these "low-level employees," Opp. 4, what is in effect a regime of strict liability. *See Owen v. City of Independence*, 445 U.S. 622, 665 (1980) (Powell, J., dissenting). This is particularly the case given the litigious nature of prisoners, *see* Judicial Conference of the United States, *Long Range Plan For The Federal Courts* 63-64 & n.14 (1995); *The Corrections Yearbook* at 6-7,[5] and the frequent disagreement among the courts over the precise contours of federal constitutional rights.

For example, a guard's seizure of sexually explicit material or revolutionary tracts might well prompt a first amendment claim.

[5] According to the Criminal Justice Institute, in 1994 prisoners filed well in excess of 35,740 lawsuits against state and federal officials. *The Corrections Yearbook* at 6-7.

B. *Wyatt v. Cole* Does Not Support The Denial Of Qualified Immunity To Prison Guards And Other Employees Of Contractors Performing Governmental Functions

Contrary to respondent's contention, *Wyatt v. Cole*, 504 U.S. 158 (1992), does not support the denial of qualified immunity to privately employed prison guards. *See* Opp. 5-7. *Wyatt* should be read—as the Court itself explained—as a narrow decision involving only private parties who act under color of state law in pursuit of private ends. As most courts of appeals have recognized, to hold otherwise would seriously harm the ability of state and local authorities in their performance of governmental functions to obtain the assistance of professionals either through contractual arrangements or their voluntary cooperation.

As the *Wyatt* Court observed, "[t]he precise issue [it decided] is whether qualified immunity, as enunciated in *Harlow*, is available for private defendants faced with § 1983 liability for invoking a state replevin, garnishment, or attachment statute." 504 U.S. at 168-69. The dispute in *Wyatt* arose out of "a soured cattle partnership" between two private parties which prompted one of the parties to obtain a writ of replevin (under a statute subsequently held unconstitutional) to seize property belonging to the other. *Id.* at 159-60. The suit, which challenged the constitutionality of the statute and sought damages, did not involve a private party performing governmental functions and therefore did not implicate any of the traditional concerns which the qualified immunity doctrine protects.

Most courts of appeals thus read *Wyatt* as requiring the denial of qualified immunity to private parties

only when they are pursuing their self-interest. Where, however, a private party is performing a governmental function, whether pursuant to a contract, court order, or request from governmental authorities, the courts of appeals have generally extended the protection of qualified immunity. *See Warner v. Grand County*, 57 F.3d 962, 964-67 (10th Cir. 1995) (extending qualified immunity to private party who performed strip search at request of the police); *Williams v. O'Leary*, 55 F.3d 320, 323-24 (7th Cir. 1995) (extending qualified immunity to physician employed by contractor providing medical services at state prison); *Leeks v. Cunningham*, 997 F.2d 1330, 1333 (11th Cir.) (per curiam) (extending qualified immunity to physician under contract to provide medical services to county jail), *cert. denied*, 114 S.Ct. 609 (1993); *see also Frazier v. Bailey*, 957 F.2d 920, 928-29 (1st Cir. 1992) (extending qualified immunity to employees of private agencies under contract with the State to provide social services).[6]

As these cases recognize, important public interests would be jeopardized by failing to extend qualified immunity to private parties who perform govern-

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[6] *See also Eagon Through Eagon v. City of Elk City*, 72 F.3d 1480, 1489-90 (10th Cir. 1996) (extending qualified immunity to private party designated by city resolution as chairperson of park event); *Sherman v. Four County Counseling Center*, 987 F.2d 397, 402-06 (7th Cir. 1993) (extending qualified immunity to private mental institution which administered anti-psychotic medication under judicial detention order).

Prior to *Wyatt*, the First Circuit had also held that a private physician who conducted a body cavity search upon presentation of a warrant by a police officer is entitled to qualified immunity. *Rodriques v. Furtado*, 950 F.2d 805, 813-16 (1st Cir. 1991).

mental functions. *Cf. Wyatt*, 504 U.S. at 167-68. Governments frequently have to rely on private parties to perform services essential to the effective conduct of their functions. But as the Tenth Circuit observed in *Warner*, if private parties

> are not permitted to raise the shield of qualified immunity, they might reject requests to aid state officials in performing governmental functions. This would clearly constrain state officials' agility in performing such functions, frustrate the government's investigatory power, and thereby limit the state's ability to service the public good.

57 F.3d at 967.[7]

Indeed, in this era in which citizens expect government to do more with less, state and local governments are increasingly contracting out many functions and services. Denying qualified immunity to

[7] In *Sherman* the Seventh Circuit explained:

> If the actions it took pursuant to court order subject it to suit, private hospitals might well refuse to accept involuntary patients. This refusal would increase the load on the strained resources of the state's public hospitals. The *Wyatt* court noted that one purpose of qualified immunity is to avoid discouraging public service. Denying qualified immunity to private hospitals in this situation would do just that. Moreover, in some instances, admission at smaller local private hospitals benefits the involuntary patient by minimizing the disruption of the patient's life. It allows the patient to be evaluated close to home and family. We believe the public interest in maximizing the number of facilities available for the detention and treatment of the mentally ill is best served by not exposing private facilities to liability for discretionary medical judgments made under court order.

987 F.2d at 406 (citing *Wyatt*, 504 U.S. at 167).

government contractors, whether they be physicians, social services workers, or prison guards, will likely decrease the number of service providers and harm the government's ability to serve the public interest.[8] Recognizing that employees of private contractors performing governmental functions are entitled to qualified immunity is thus of the utmost importance to the government's ability "to protect the public at large." *Wyatt*, 504 U.S. at 168.

II. THE COURT OF APPEALS' RATIONALE FOR DENYING QUALIFIED IMMUNITY IS INDEFENSIBLE

While paying lip service to the public's "interest in maintaining secure and efficient correctional facilities," Pet. App. 15a, and acknowledging "that correctional officers working for a private, for-profit corporation that has contracted with the state are serving a public interest by operating Tennessee's prison facilities," *id.*, the court of appeals nonetheless held that petitioners were not entitled to qualified immunity. *Id.* at 16a-17a. It did so on the novel

[8] Respondents asserts that the cases in which the courts of appeals have extended qualified immunity to private persons "involv[ed] high-level professionals who exercised significant discretion—a critical factor under" *Wyatt*, rather than "low-level employees, such as . . . prison guards." Opp. 4. Contrary to respondent's suggestion, prison guards exercise significant discretion in the various duties they perform, such as conducting prisoner searches, responding to disturbances which may require the use of force, and enforcing prison rules. Therefore, prison guards are entitled to qualified immunity. In any event, the Court's decision in *Navarette* disposes of respondent's argument. *See* 434 U.S. at 561-62.

ground that petitioners, as employees of a private, for-profit corporation,

> are not principally motivated by a desire to further the interests of the public at large. Rather, as employees of a private corporation seeking to maximize profits, correctional officers act, at least in part, out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security. While this arguably does not vitiate furtherance of the public interest, it upsets the balance qualified immunity seeks to establish "between compensating those who have been injured by official conduct and protecting the government's ability to perform its traditional functions." The balance struck by qualified immunity, at least implicitly, contemplates a government actor acting for the good of the state, not a private actor acting for the good of the pocketbook.

Pet. App. 15a-16a (quoting *Wyatt*, 504 U.S. at 167). And asserting that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise," Pet. App. 16a n.4, the court opined that "this increased threat of injury by violation of constitutional guarantees counsels against granting qualified immunity to correctional officers employed by a private corporation to run a state's prison facilities." *Id.* at 16a.

The court of appeals' reasoning is indefensible. It rests on dubious premises regarding the behavior of the guards and their employer. Quite significantly, the court of appeals does not cite any empirical evidence for its assertions, a telling omission given

the widespread use of contractor operated prisons. *See Private Adult Correctional Facility Census*, at 1.[9] Indeed, the Director of the University of Florida's Private Corrections Project has stated that "I have found no evidence of a private firm having entered into a consent decree or being placed under a court order as a consequence of a finding of unconstitutional jail or prison conditions in a facility for which it was responsible." *Matters Relating To The Federal Bureau Of Prisons: Hearing Before the Subcomm. on Crime of the House Comm. on the Judiciary*, 104th Cong., 1st Sess. 108 (1995) (statement of Prof. Charles Thomas at n.30). As Professor Thomas, who used four different measures to determine whether contract prisons provide "high caliber correctional services," concludes:

> the best available evidence provides no support for the hypothesis that the cost saving strategies of private management firms undermine the caliber of the services provided in the facilities for which they are responsible. To the contrary, it is common for jurisdictions that have contracted for the private management of correctional facilities to report that the overall caliber of the services provided have improved in their scope and quality.

Id. at 110.

Beyond this evidence, the court of appeals' theory that correctional officers of contract prisons pose an increased threat to inmates' constitutional rights because they "act . . . out of a desire to maintain the

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[9] As of December 31, 1995, there were more than 37,000 inmates in the approximately eighty contract prisons then operating. *See Private Adult Correctional Facility Census* at 1.

profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, rests on highly problematic assumptions about the behavior of both the guards and their employer.

As an initial matter, it seems quite unlikely that cost pressures and job security concerns are more likely to influence the behavior of guards in contractor operated prisons than that of their counterparts in state operated prisons, let alone induce them to violate the inmates' constitutional rights more frequently. Indeed, even if it is true that cost pressures are likely to induce prison guards to cut constitutional corners in private prisons, the court of appeals' decision ignores that in this era in which the citizenry has increased expectations for efficient government, cost pressures also exist in government-owned institutions. The restraints on corrections officers in both types of institutions are thus roughly the same. *Cf.* Pet. App. 20a (Nelson, J., concurring). It is incorrect, then, to assert that prison guards employed by contract prisons pose an "increased threat" of constitutional injuries over the threat posed by guards employed directly by the State.

Indeed, considering the nature of constitutional injuries which prison guards are most likely to inflict in their interactions with prisoners—"using excessive physical force in violation of the Cruel and Unusual Punishments Clause," *see Hudson v. McMillian*, 503 U.S. at 7, or conducting searches in an abusive manner, *see Bell v. Wolfish*, 441 U.S. 520, 560 (1979)—it is improbable that employer profitability is a factor in guards' decisionmaking. But even if the profit motive is a factor in prison guards' decisionmaking, it would—contrary to the court of appeals'

suggestion—actually induce them to commit fewer constitutional violations.

For example, a guard responding to a disturbance would be inclined to use less force than that which gives rise to a constitutional violation because the use of force might well inflict a physical injury which requires medical care. The provision of such care would, of course, increase the corporation's costs and thus decrease profitability; a guard who used excessive force could be disciplined and might well be terminated. Moreover, if the guards violate prisoners' constitutional rights, their behavior could result in their employer losing its contract and unemployment for themselves. The guards' self-interest, then, is in abiding by the Constitution. Contrary to the court of appeals' theory, if guards at contract prisons act "out of a desire to maintain the profitability of the corporation for whom they labor, thereby ensuring their own job security," Pet. App. 15a, they are likely to pose a diminished threat of constitutional injury.

Nor is it self-evident that "private corporations running correctional facilities have a greater incentive to cut costs by infringing upon the constitutional rights of prisoners in order to ensure the profitability of the enterprise." Pet. App. 16a n.4. This reasoning ignores the existence of the various political, legal and market based incentives influencing the corporation's behavior.

First, it ignores that the State, through both its legislative and executive branches, maintains oversight of the corporation and retains the right to cancel the contract at any time upon the giving of adequate notice. *See* Tenn. Code Ann. § 41-24-104(a)(1)-(2) & (c)(3) (Pet. App. 54a); *id.* § 41-24-109 (Pet. App.

59a). Second, it ignores the availability of judicial oversight through suits under § 1983. Indeed, if it were the case that contract prison operators cut constitutional corners, *but see Matters Relating To The Federal Bureau of Prisons* at 108, such conduct would most likely manifest itself in the type of systemic violations which commonly give rise to declaratory and injunctive relief.[10] Granting prison guards qualified immunity in damages actions does not, of course, affect the availability of other relief which is available under Section 1983.[11] Moreover, an adjudication that it has violated prisoners' rights presents the corporation with the additional risk of losing its contract for failing to meet acceptable performance standards. *See, e.g.*, Tenn. Code Ann. § 41-24-105 (Pet. App. 54a-56a).

Third, the court of appeals ignores the presence of competition from other private correctional firms who have demonstrated their ability to operate prisons in a cost-effective manner without infringing constitu-

[10] Whether or not a private, for-profit corporation is suable for damages as a "person" under Section 1983 in the same manner as a municipal corporation *see Monell v. Department of Social Services*, 436 U.S. 658, 690 (1978) (requiring showing of custom or policy to establish municipal liability), declaratory and injunctive relief remain available.

[11] Indeed, if it were the case—contrary to the evidence—that the profit motive creates an incentive for contract prison operators to violate inmates' constitutional rights, it is nonetheless illogical to deny guards qualified immunity. Such pressures would likely manifest themselves in constitutional violations involving prisoners' living conditions. "Low level" guards, however, generally do not make the type of management decisions which are most likely to cause these types of constitutional violations. Denying guards qualified immunity thus does not alleviate this concern.

tional norms. *See Matters Relating To The Federal Bureau of Prisons* at 107-08 (Statement of Charles Thomas). Contract prison operators thus have substantial incentives to comply with the Constitution; guards employed by these firms are no more likely to violate constitutional rights than their public sector counterparts. They should therefore be granted qualified immunity.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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